

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

JONATHAN O. CHENOWETH
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FREDDIE CARROLL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)

No. 85A04-0710-PC-588

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-9509-CF-70

April 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Freddie Carroll appeals the post conviction court's denial of his petition for post-conviction relief ("PCR"). We affirm.

Issue

Carroll raises one issue for our review, which is whether he was denied effective assistance of appellate counsel.

Facts

On September 20, 1995, Carroll approached Belinda Webb in a local bar and asked to talk. The pair had dated in the past. Webb said no and Carroll was eventually asked to leave because of his disruptive behavior in the bar. Webb and a friend, Todd Cochran, left the bar at 3:00 a.m. Carroll approached Webb and Cochran in the parking lot where he had been waiting. Webb and Cochran left in her car, and Carroll followed them to Cochran's house.

When Webb pulled into the driveway, Carroll came to the driver's side of the car, opened the door, placed a gun to Webb's head, and stated, "Belinda, you're dead." Tr. pp. 324, 361. He attempted to fire, but apparently the safety of the gun was in place. He shot two times, striking Webb in the back and Cochran in the leg. Carroll then fled to California. On September 21, 1995, the State charged Carroll with the attempted murder of Webb.

A jury convicted Carroll of Class A felony attempted murder and the trial court sentenced him to forty years. Carroll initiated a timely appeal in 1997 and appellate counsel raised two issues: whether the trial court erred in denying Carroll's request for a

continuance of trial; and whether the trial court erred in denying Carroll's request for a continuance of the sentencing hearing. This court affirmed his conviction. See Carroll v. State, No. 85A05-9701-CR-15 (Ind. Ct. App. Feb. 18, 1998).

Carroll filed a pro se PCR petition on September 23, 2000. An attorney appeared for Carroll on November 8, 2004 and amended the petition. The PCR court held a hearing on August 27, 2007, and issued an order denying the petition the next day. This appeal followed.

Analysis

A PCR petitioner must establish grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Ivy v. State, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), trans. denied. When a post-conviction court denies relief, the petitioner appeals from a negative judgment and must demonstrate on appeal that the evidence unerringly and unmistakably leads to a conclusion opposite that reached by the court. Ivy, 861 N.E.2d at 1244. We may reverse the post-conviction court's decision only if the evidence is without conflict and leads to a conclusion opposite that reached by the court. Id.

Carroll contends that the jury instructions wrongly instructed the jury on the specific intent element of attempted murder. Carroll asserts that the instructions clearly violated the rule announced in Spradlin v. State, 569 N.E.2d 948 (Ind. 1991), and his appellate counsel was ineffective for failing to challenge the instructions. Because Carroll's trial counsel did not object to the instructions at trial, appellate counsel would

have been required to raise the issue on direct appeal as fundamental error.¹ See Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007) (failure to object at trial results in waiver unless the error is so prejudicial that it makes a fair trial impossible).

Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Id. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

Our supreme court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied. When reviewing a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance. Seeley v. State, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), trans. denied. To prevail, Carroll must show from the information available in the trial record or otherwise known to appellate counsel that counsel failed to

¹ Counsel for Carroll did object to the wording of the last sentence of instruction #8, but on the grounds that the language used did not exactly match the cases cited to support the proposition. Counsel did not object to the instructions as insufficient in terms of relaying the necessity of the specific intent element of attempted murder.

present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy. See id.

In Spradlin, our supreme court developed the rule for instructing juries on an attempted murder charge. The Spradlin court held that an instruction containing the elements for attempted murder “must inform the jury that the State must prove beyond a reasonable doubt that the defendant, with intent to kill the victim, engaged in conduct which was a substantial step toward such killing.” Spradlin, 569 N.E.2d at 950. Our supreme court later handed down Greenlee v. State, 655 N.E.2d 488, 492 (Ind. 1995), a case where although the instructions needed some revision to be in line with Spradlin, the court concluded that “taken together they adequately informed the jury that it needed to conclude the defendant must have acted with the intent to kill before it could convict him.” The first instruction in Greenlee directed jurors that if they decided the defendant knowingly or intentionally attempted to murder the victim, then they could find him guilty. Id. Three additional instructions mentioned intent and informed jurors that “attempt is a crime of specific intent.” Id.

Carroll first takes issue with final instruction #8 and contends it did not clearly establish that specific intent is necessary and it did not properly define specific intent. Carroll analogizes this instruction with the problematic instruction in Parks v. State, 646 N.E.2d 985 (Ind. Ct. App. 1995), trans. denied. Carroll also argues that final instruction #8 implies that the specific intent element could be established by evidence that Carroll knowingly fired the gun at Webb.

Final instruction #8 read:

To convict the Defendant of attempted murder, the State must have proved each of the following elements:

1. The Defendant, Freddie G. Carroll, Jr.;
2. acting with the specific intent to commit murder, to-wit: knowingly or intentionally killing another human being;
3. Did point and discharge a gun at Belinda Webb;
4. Which conduct constituted a substantial step toward the commission of the intended crime of murder.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of the crime of Attempted Murder.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of the crime of Attempted Murder, a Class A felony.

Specific intent for attempted murder is intent to achieve death, rather than intent to engage in conduct with carried with it a risk of death.

Tr. p. 256.

This instruction advised the jury that specific intent was necessary and defined that intent as “intent to achieve death rather than intent to engage in conduct with carried with it a risk of death,” id., unlike the instruction in Parks, which told the jury that to establish specific intent, the State must prove that “the Defendant knowingly or intentionally committed an act.” Parks, 646 N.E.2d at 986. The instruction here defined the crime of murder as one that could be committed knowing or intentionally, but clearly set out that Carroll had to act with specific intent to kill to be guilty of the crime of attempted murder. Moreover, the instruction informed the jury that to be found guilty, Carroll needed to have engaged in conduct “which constituted a substantial step toward the

commission of the intended crime of murder” in line with our supreme court’s directive in Spradlin. Tr. p. 256; see Spradlin, 569 N.E.2d at 950 (holding that an instruction for attempted murder must inform the jury that “the defendant, with intent to kill the victim, engaged in conduct which was a substantial step toward such killing.”). We conclude that the elements set out by instruction #8 were not defective or contrary to law.

Carroll also argues that final instructions #6 and #7 added to the confusion by referencing the term “knowingly.” Final instruction #6 quoted the charging information and provided in part: “[Carroll] did attempt to commit the crime of murder by knowingly or intentionally pointing and discharging a gun at Belinda Webb, which conduct constituted a substantial step toward the commission of the crime of murder, to-wit: knowingly or intentionally killing another human being.” Tr. p. 254. Final instruction #7 included the statutory definition of murder, “a person who knowingly or intentionally kills another human being,” and Carroll contends this too confused the jury. Tr. p. 255. The references to “knowingly,” however, do not appear as an element of attempted murder; they instead appear in the context of murder. In addition, instruction #13 differentiated “intentionally” and “knowingly” by defining the terms as follows:

A person engages in conduct “intentionally” if, when he engages in the conduct, it is his conscious objective to do so.

A person engages in conduct “knowingly” if, when he engages in the conduct, he is aware of a high probability that he is doing so.

Tr. p. 261. Taken together, the instructions set out that specific intent for attempted murder required a particular mindset of the defendant—he intended to kill the victim.

Instructions #6, #7, and #8 are strikingly similar to the instructions given in Dawson v. State, 810 N.E.2d 1165 (Ind. Ct. App. 2004), trans. denied. In that case we affirmed the denial of post-conviction relief and found that appellate counsel was not ineffective for failing to appeal the issue. Dawson insisted that three jury instructions gave improper guidance on the crime of attempted murder. Id. at 1174. The elements instruction given in Dawson directed the jury to find the following elements in order to render a verdict of guilty: “1) the defendant; 2) knowingly; 3) with intent to kill; 4) engaged in conduct, cutting at and against the [victim], by means of a deadly weapon, to wit: a box knife; 5) which was a substantial step toward the commission of the crime of Murder which is to knowingly kill another human being.” Id. at 1174. Other instructions included the statutory definitions of attempted murder and murder, quotations from the charging information, and definitions of knowingly and intentionally, much like instructions #6, #7, and #13 here. We concluded that the instructions in Dawson adequately informed the jury to convict only if the defendant had the specific intent to kill his victim, and therefore we held that appellate counsel was not ineffective. Id. at 1176. We conclude that the instructions here also succeed in informing the jury that intent to kill is an element of the crime of attempted murder. Because the instructions were not improper, we cannot conclude that appellate counsel was deficient in her performance.

Carroll makes much of the fact that the jury asked a question during deliberations and asked the trial court to define culpability, which the trial court did not do. Carroll contends that this question illustrates the jurors’ confusion with the instructions. We

disagree. We simply cannot read the minds of the jurors to know what issue confused them or even if the question had anything to do with the issue of intent.

Although Carroll contends the jury instruction issue was a winning issue for appeal and was wrongly omitted, his appellate counsel instead challenged the trial court's denials of his motions to continue his trial and his sentencing hearing. Carroll's appellate counsel is given broad latitude to make strategic decisions regarding what claims to raise on appeal. Beighler v. State, 690 N.E.2d 188, 194 (Ind. 1997). Accordingly, we give considerable deference to appellate counsel's strategic decisions and "will not find deficient performance in appellate counsel's choice of some issues over others when the choice was reasonable in light of the facts of the case." Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). We find that the instructions, taken as a whole, properly informed the jury of the specific intent requirement for an attempted murder conviction. As such, it was not a significant or obvious issue for appellate counsel to raise on appeal and her performance was not deficient. Carroll's ineffectiveness claim must fail.

Conclusion

Carroll has failed to establish that he received ineffective assistance of appellate counsel. We affirm the denial of post-conviction relief.

Affirmed.

CRONE, J., and BRADFORD, J., concur.